STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

TERRY BENARD JACKSON,

Defendant-Appellant.

UNPUBLISHED
March 22, 2005

No. 253392
Wayne Circuit Court
LC No. 03-010142-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

A jury found defendant guilty of safe breaking, MCL 750.531, and breaking and entering, MCL 750.110. Defendant was sentenced to thirty months to fifteen years in prison for the safe breaking conviction and three to ten years in prison for the breaking and entering conviction. The convictions arose from the early morning breaking and entering of a dollar store and the removal of the store's ATM machine. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived of the effective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or a motion for new trial before the trial court, or this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant claims he received ineffective assistance of counsel when his trial counsel failed to move to quash his bindover for insufficient evidence. Our Supreme Court recently ruled that "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1999). Nothing in the record indicates that defendant was unfairly convicted. Indeed, as will be discussed, the prosecutor presented sufficient evidence at trial to support defendant's convictions. Therefore, defendant may not raise this issue on appeal.

Defendant next claims his counsel was ineffective because she advised him to proceed with a joint trial with his codefendant. Because he and his codefendant were tried jointly, the jury was able to hear codefendant's statement that "the other guy doesn't want me to tell you where the ATM is." Defendant argues that this statement's prejudicial effect was so great that it

denied him a fair trial. However, the record clearly shows that defendant chose a joint trial knowingly and voluntarily. There is no support for defendant's contention that the admission of codefendant's statement was outcome determinative, given the evidence against defendant. See *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999). And defendant has failed to overcome the presumption that the decision to seek a joint trial was a matter of strategy. We will not assess strategy using hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).[1]

Defendant next argues that the trial court erred by denying his motion for directed verdict. We disagree.

"When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001), citing *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). Sufficient evidence was presented that defendant broke and entered the store with the intent to commit larceny where there was a hole in the back wall of the store, the ATM and a dolly were missing from the store, defendant was pushing a dolly in the middle of the night a short distance from the store, defendant directed police to the location of his codefendant, and his codefendant told police where the ATM was. Sufficient evidence was presented that defendant attempted to break or injure a depository of money with the intent to commit larceny where the front of the ATM was lying on the floor in the store, a metal pipe and crowbar were found near the hole in the store's wall, the ATM's keypad was smashed, and a crowbar was found in the vicinity of the two defendants. MCL 750.110; MCL 750.531; *Aldrich*, *supra* at 122. Therefore, the trial court properly denied defendant's motion for directed verdict.

Finally, defendant argues that he was deprived of a fair trial by two instances of prosecutorial misconduct. We disagree.

Defendant first asserts that during the prosecution's closing argument, the prosecution argued a fact not in evidence when the prosecution stated that co-defendant informed the police, "Hey, Mr. Jackson here told me not to tell you where the ATM is." Indeed, the trial testimony indicated that co-defendant informed the police that "that other guy doesn't want me to tell you where the ATM machine is." Because defendant failed to object to this statement below, our review is limited to determining whether the prosecution committed a plain error that affected defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Defendant has failed to identify plain error. Viewed in context, the now-challenged statement does not reflect the prosecution's statement of a fact not in the record. Rather, the statement reflects a reasonable inference from the evidence presented at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[1] Defendant also argues that the trial court improperly allowed him to be tried jointly with his co-defendant. However, by expressly stating his desire for a joint trial, defendant waived his right to appeal this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that the prosecution improperly argued facts not in evidence during closing arguments when the prosecution stated that the men who drove up in a van while defendant was being detained were "two poor African immigrants" and that these men drove up to "three police cars with [their] lights on." A review of the record shows that the officer actually testified that the men in the van had accents and "sounded like they were from a different country." No one testified that the police cruisers had their lights on. Regardless, defendant has failed to show that these statements denied him a fair and impartial trial. Even if these inaccurate statements prejudiced defendant in some way, the trial court's instruction that the attorneys' arguments were not evidence cured any prejudice against defendant.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer